

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TROY JEROME GARROW,

Defendant-Appellee.

UNPUBLISHED

April 11, 2006

No. 258737

Kent Circuit Court

LC No. 04-003199-FH

Before: Kelly, P.J., Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to distribute an imitation controlled substance, MCL 333.7341(3), and sentenced as a controlled substance second offender, MCL 333.7413(2), and as a habitual offender, third offense, MCL 769.11, to 25 to 48 months' imprisonment.

On March 22, 2004, officers from the Grand Rapids Police Department responded to a domestic dispute call involving defendant. Defendant was arrested on city charges of hindering and opposing, and providing false information to a police officer. A search conducted at the Kent County Jail led to the discovery of three packaged rocks of imitation cocaine in one of defendant's pants pockets, which led to the charge and conviction in the present case.

Defendant argues that his Fifth Amendment rights were violated when the trial court allowed Officer Bush to testify about incriminating statements that defendant made after Bush discovered the imitation cocaine. We review this unpreserved constitutional issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that his constitutional rights were violated on three grounds: Bush failed to read defendant his *Miranda*¹ rights, the statements were made while defendant was in custody, and the statements were involuntary. The record contains no evidence that any officer read defendant his rights under *Miranda* at any time, and it is clear that defendant was in custody when he made the incriminating statements. However, an officer is only obligated to give *Miranda* warnings to an accused when the person is subject to a custodial interrogation. *People*

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

v Ish, 252 Mich App 115, 118; 652 NW2d 257 (2002). Custodial interrogation is “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). The record clearly demonstrates that defendant made his statements voluntarily, and not as a result of any police questioning. Because “statements made voluntarily by persons in custody do not fall within the purview of *Miranda*,” defendant’s statements were admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997), citing *People v Hartford*, 117 Mich App 413, 416; 324 NW2d 31 (1982). Defendant’s constitutional rights were not violated by the admission of his statements to Bush.

Defendant next argues that the trial court erred when it allowed Bush to testify about defendant’s statements because there was insufficient evidence to establish the corpus delicti of the crime. We disagree. We review a trial court’s decision to admit evidence in satisfaction of the corpus delicti requirement for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Biggs*, 202 Mich App 450, 455; 509 NW2d 803 (1993).

In *People v Williams*, 422 Mich 381, 391; 373 NW2d 567 (1985), our Supreme Court held that the prosecution is not required to present independent evidence of every element of the offense before a defendant’s confession may be admitted. In *Ish*, *supra*, this Court stated,

The purpose of the corpus delicti rule is to prevent the use of a defendant’s confession to convict him of a crime that did not occur. *People v Konrad*, 449 Mich 263, 269; 536 NW2d 517 (1995). The rule bars the prosecution from using a defendant’s confession in any criminal case unless it presents direct or circumstantial evidence independent of the defendant’s confession that the specific injury or loss occurred and that some criminal agency was the source or cause of the injury. *Id.* at 269-270; *People v Hayden*, 205 Mich App 412, 413; 522 NW2d 336 (1994); *People v Cotton*, 191 Mich App 377, 389; 478 NW2d 681 (1991). Once this showing has been made, “[a] defendant’s confession then may be used to elevate the crime to one of a higher degree or to establish aggravating circumstances.” *Id.* [*Ish*, *supra* at 116-117.]

The Court went on to say that a requirement that the prosecution present independent evidence of every element of the offense before defendant’s confession would be admitted “loses sight of the purpose of the rule and ‘would require that the entire crime be proved before a confession could ever be admitted.’” *Id.* at 117, quoting *Konrad*, *supra* at 270.

To convict defendant, the prosecutor was required to prove that defendant possessed an imitation controlled substance and had the intent to distribute that controlled substance. MCL 333.7341(3). Defendant argues that, although two or three pieces of an imitation controlled substance evidences possession of that substance, there was no independent evidence presented to indicate delivery or the intent to distribute.

We first address whether defendant’s statements amount to a confession of guilt. Where the defendant makes admissions of fact that do not amount to confessions of guilt, those admissions may be admitted to prove the corpus delicti of the crime. *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991), citing *People v Porter*, 269 Mich 284, 289-291; 257

NW 705 (1934). Defendant's statements indicate that defendant possessed imitation cocaine and that he had packaged and sold several other rocks of imitation cocaine. Although the trial court ruled that defendant's statements were factual statements rather than a confession, it insinuated that if defendant had said "all right, you got me, I've been selling this as imitation—as whatever language you want to say, as coke or crack, but it's really gank. This is part of the stuff I was selling as gank," then his statement would have been deemed a confession. However, when defendant's statements are considered together, they mirrored the trial court's statement. The trial court's conclusion that defendant's statements were not a confession was erroneous.

Regardless of this error, we find that the trial court reached the correct result when it ruled that the prosecutor presented sufficient evidence independent of defendant's confession to establish the corpus delicti of the crime charged. "Possession with intent to deliver can be established by circumstantial evidence and reasonable inferences arising from that evidence, just as it can be established by direct evidence." *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748 (1992). The evidence presented at trial demonstrated that defendant possessed three "rocks" of what looked like crack cocaine, packaged in baggies. There was no evidence to suggest that the substance was possessed simply for personal use—Bush did not find any paraphernalia typically used to ingest crack cocaine on defendant's person. Additionally, Bush's testimony that the rocks looked like crack cocaine and that the rocks were tested before being secured in an evidence envelope supports the inference that the imitation crack cocaine was packaged in the same manner as actual crack cocaine.

Furthermore, although defendant did not state that he intended to sell the three rocks of imitation cocaine, that intent can be inferred from the evidence presented. The intent to deliver may be inferred from the quantity of narcotics that a defendant has in his possession, from the way that the narcotics are packaged, and from other circumstances surrounding the arrest. *Wolfe*, *supra* at 524. Actual delivery is not required to prove intent to deliver; rather, minimal circumstantial evidence is sufficient for a jury to properly infer intent. *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998). Here, the intent to distribute can be inferred from the packaging of the imitation crack cocaine, and from the nature of the substance itself, as it is unlikely that an imitation drug would be intended for personal use. There was sufficient circumstantial evidence to establish the corpus delicti of the crime charged.

Defendant argues that the prosecutor committed misconduct during his closing and rebuttal arguments. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Prosecutorial misconduct is decided case by case, and this Court must consider the relevant part of the record and examine the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*

Defendant challenges seven statements made during the prosecutor's closing and rebuttal arguments, and he contends that the prosecutor denigrated the defense, injected innuendo into the

proceedings, and argued facts not in evidence. The challenged comments made by the prosecutor generally focused on discrepancies between defense counsel's opening statement and defendant's testimony at trial. We find that the comments constituted proper argument.

The defense theory at trial was that defendant's possession of the imitation cocaine was innocent and for his personal use. Defense counsel also asserted that when the police arrived, defendant was "not in good shape at all. His brain ain't working very well." Defense counsel explained defendant's false and incriminating statements to the police as an attempt to pull "their chain."

Defendant admitted that he lied to the police, stated that he was very upset and gets belligerent when drunk, and explained that if he is drunk and upset with someone, he will say untrue things just to "jerk their chain." However, defendant's testimony diverged from the defense theory when he denied lying to the officers and asserted a different explanation for his response to the officers' inquiry about his name. Defendant also gave conflicting testimony about his ability to remember the events of the evening. He testified that he blacked out at the jail and only recalled the events by hearing or reading about them, but admitted that he did not black out and "was just highly drunk." Instead of testifying that he was "jerking the chain" of the officers when he made the incriminating statements about the fake crack, defendant admitted that he said the "stuff" found in his pocket was wax, but denied saying that he packaged it himself, and denied saying "[m]e and Billy found 25 rocks. I sold all but those." Defendant also stated that Bush was "mistaken" in his belief that defendant made the latter comments. He stated that he did not recall making the latter comments, but he knew he was intentionally egging on the police.

Here, the prosecutor's statements made during his closing argument did not improperly question defense counsel's veracity or suggest that defense counsel was intentionally misleading the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). The prosecutor discussed the defense theory of the case, and argued that defendant's testimony about his memory and his statements to the police did not support that theory. The prosecutor suggested that the jury had a credibility determination to make, and argued that based on the defense theory advanced, and defendant's and King's testimony, the defense presented an inconsistent theory that lacked credibility.

This constitutes proper argument. A prosecutor may argue from the evidence that a witness is worthy or not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), and does not need to confine his argument to the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Prosecutors are "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted, alteration original). The prosecutor's argument was based on conflicting testimony given by defendant, as well as testimony given by defendant that did not support the defense's theory of the case. The defense theory of the case was prevalent throughout trial, and the prosecutor commented on why the evidence should not be believed, given the defense theory. These arguments constituted a fair comment on the evidence.

The challenged statements made during the prosecutor's rebuttal were also proper. A party has the right to fairly respond to issues raised by the other party. See *People v Jones*, 468

Mich 345, 353; 662 NW2d 376 (2003). In *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995), this Court stated that “[t]he nature and type of comment allowed is dictated by the defense asserted, and the defendant’s decision regarding whether to testify. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant’s theory or evidence.” Three of the challenged rebuttal statements were made in the context of the prosecutor’s argument that defendant was not a credible witness, and that given defendant’s testimony and the evidence, the reasons advanced by defense counsel for acquittal did not stand up. The statement that defense counsel “can’t even get the facts straight” was made in rebuttal to defense counsel’s assertion regarding the amount of alcohol that defendant drank that night, which was especially relevant given the defense theory that defendant consumed enough alcohol to affect his memory and personality. The comments made during the prosecutor’s closing and rebuttal arguments were proper.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Michael J. Talbot